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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-62.

HUBERT WHEELER, ET AL.,

Petitioners,

v.

ANNA BARRERA, ET AL.,

Respondents.

**BRIEF OF CATHOLIC LEAGUE FOR RELIGIOUS AND
CIVIL RIGHTS, CITIZENS FOR EDUCATIONAL
FREEDOM, NATIONAL UNION FOR CHRISTIAN
SCHOOLS, AND TORAH UMESORAH-NATIONAL
SOCIETY FOR HEBREW DAY SCHOOLS,
AMICI CURIAE.**

INTRODUCTORY STATEMENT.

The relevant facts, the statutory provisions involved and the opinion of the court below are sufficiently set out in the submissions of the Petitioners and the Respondents. The *amici curiae* have received written consents from the parties to the filing of this brief.

INTERESTS OF THE AMICI CURIAE.

The Catholic League For Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to promote good will and harmonious relations in the community and to combat all forms of religious prejudice and discrimination. The League was founded in 1973 in long overdue recognition that, of all the forms of religious bigotry which have stained American history, anti-Catholic bigotry has been the most persistent and pervasive. The League is in part concerned over law-related manifestations of bigotry and is alarmed, in particular, over efforts today being made to suppress the exercise of First Amendment liberties by supporters of religious schools upon the pretext that such exercise is "divisive".

Citizens for Educational Freedom (CEF) is a nonprofit nonsectarian organization with nationwide membership and branches in a majority of states. Founded in 1959, CEF is especially dedicated to protecting the rights of parents in the educating of their children. CEF desires to see excellence, equality and freedom in education for every American child, regardless of race or creed. CEF is also responsive to the now widespread alarm felt by people of all religious faiths over the growth of a legally enforced secularist educational monopoly in American education.

The National Union of Christian Schools is a union of parent-controlled Calvinistic Christian schools in the United States and Canada. At present there are 300 member school units. These parent-owned and parent-operated educational institutions embrace 64,000 pupils and 28,000 teachers. They are operated on the principle that parents have the primary responsibility for the education of their children.

Torah Umesorah-National Society for Hebrew Day Schools is the national agency of all the Hebrew day schools in the United States which offer a combined program of

Hebrew and general studies. Established in 1944, Torah Umesorah is currently composed of some 413 schools in 34 states in 170 communities. These schools have an enrollment of 81,000 students. Torah Umesorah also serves as an umbrella agency for a number of professional organizations such as school principals, PTA groups and teachers' associations. The Society is governed by a board of directors who are elected annually and by an administrative board of seminary deans.

QUESTIONS PRESENTED.

The contention of the Petitioners that the Act does not require the rendering of services during regular school hours by publicly employed personnel was decisively answered by the court below. It can be said, in sum, that the Court of Appeals' understanding of the question represents the national understanding of the question. The Congressional history, the general practice of the federal government and the states for almost a decade, and a vast literature on ESEA provide unanswerable testimony that the Act is intended to benefit educationally deprived children in all—not just some—private schools coming within the terms of Title I.

The Petitioners are therefore left to the contention that this Court must, in effect, rewrite the Act so that its effect upon parochial school children could be summarized as follows:

While ESEA was enacted "in recognition of the special educational needs of children of low-income families" (whether in public or private schools), those children who attend religiously affiliated private schools must, solely because of that fact, be cut off from the benefits of the Act.

The Congress included parochial school children; the Plaintiffs urge this Court to exclude them. They urge that such reading of the Act is required by the Establishment Clause of the First Amendment. Such a reading of the Act would at once result in *other* constitutional issues, which are:

1. Whether the exclusion of children from the benefits of the Act, solely on account of the exercise of religious conscience by them and by their parents, would constitute denial to such children and their parents of their rights under the Free Exercise Clause of the First Amendment.

2. Whether such exclusion, which results in loss of education to such children and loss of financial benefits to their parents, would deny both children and parents due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.
3. Whether such exclusion would constitute unreasonable and arbitrary discrimination against such children and parents, in the exercise of their fundamental liberties, contrary to the requirements of the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

1. **The Exclusion of Children From the Benefits of the Act, Solely on Account of the Exercise of Religious Conscience by Them and by Their Parents, Would Constitute a Denial to Such Children of Their Rights Under the Free Exercise Clause of the First Amendment.**

The Supreme Court has long recognized that the Establishment Clause, though cast in absolute terms, may, if carried to a logical extreme, conflict with other constitutional protections. *Everson v. Board of Education*, 330 U. S. 1, 18 (1947); *Zorach v. Clauson*, 343 U. S. 300, 314 (1952); *Board of Education v. Allen*, 392 U. S. 236, 242-243 (1968); *Walz v. Tax Commission*, 397 U. S. 664, 665-669 (1970); *Lemon v. Kurtzman*, 403 U. S. 602, 614 (1971). Plainly, Establishment claims may encounter tension with, and find limitation in, Free Exercise claims.

ESEA is truly *public* welfare legislation, not special legislation. It is designed to serve all the members of a public class, not just a part (albeit a majority) of persons in that class. It was enacted in the very teeth of two of the worst challenges which American society faces—lack of education and poverty. The two, as the Congress noted, are profoundly interrelated. Neither Providence nor that society has decreed that children in parochial schools are exempted from poverty or devoid of the need for educational opportunity. The Congress, in justice and with good sense, noted that the educational needs of children in poverty areas are as *general* as poverty itself. And so the legislative relief was designed by the Congress to be general—that is to say, *public* welfare legislation.

This Court, in *Everson v. Board of Education*, 330 U. S. 1, 16 has said that government

“ . . . cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it*, from receiving the benefits of public welfare legislation.”

This Court can and must take judicial notice of the fact that most parents who send their children to religiously affiliated schools do so for *religious* reasons—“because of their faith”. The decision so to enroll the child, and the act carrying out that decision, are acts of conscience and of will based upon religious interest and desire. If, as the Petitioners urge, the Court should rule that, solely “because of their faith”, the children in question must be denied the benefits of the legislation, the children (and their parents) would certainly be burdened in the exercise of their religion. Can it be doubted that, where the Congress has determined that *all* in the class of beneficiaries need help, if such help were then given to all in the class *except* those who had made the religious choice, those who had made that choice would be officially discouraged from making it? Where the class of beneficiaries consists of children of *low-income families*, the deterrent effect is patent. Put in other terms, there would be an effect, indeed hydraulic, pulling people to give up the religious schools which they choose in conscience, in favor of nonreligious schools which, in good conscience, they reject.

No aspect of the Petitioners' claim herein more strongly calls for reconsideration than the fact that, if granted, it would point directly towards forcing all American children, save the very well to do, into public education. Public education is not, however, acceptable to great numbers of Catholic, Jewish and Protestant parents, and education for their children in a religious school is a matter of

strict conscientious obligation to them. *Millions of religiously committed American parents are not going to see their children subjected to schooling in which prayer is silenced, in which the Ten Commandments as the Word of God may not be taught, in which religious values are relativized, and in which—backed by the power and prestige of the state—secular humanist, pagan and agnostic values are made to permeate the daily life of the classroom.*¹

The crude answer, "Then let them pay for such schools", is no answer at all in terms of (a) the needs of today's children in education, (b) inflation, unemployment, economic uncertainty and educational costs, and (c) the demands of the religious conscience of parents. That answer confronts the religious conscience today with the same slapping effect as "Let them eat cake" did the poor of the *ancien régime*. As the Chief Justice stated in his dissenting opinion in *Sloan v. Lemon*, — U. S. —, 37 L. Ed. 2d 948, 981 (1973):

"However sincere our collective protestations of the debt owed by the public generally to the parochial school system, the wholesome diversity they engender will not survive on expressions of good will."

It would indeed be foolish, in today's economy, to suggest that such denial of benefits to low income parents and children would not be called a burden in the sense that the term "burden" has been used in Free Exercise cases.

In the leading case of *Sherbert v. Verner*, 374 U. S. 398 (1963) a Seventh Day Adventist was refused participation

1. The splendid recent plea of Mr. Justice Powell before the American Bar Association for the return of "decency" and "respect for law" in American society triggers directly the disturbing question of how far civility, decency, non-violence and morality are going to be realized in a society in which virtually all children will be forced to spend their school time in schools where traditional precepts of God-centered morality may not be taught.

in public benefits with others in the class of the unemployed solely on the ground of her having made an act of her religious conscience by refusing to work on the Sabbath day of her faith. This exclusion from benefits was held a denial of her free exercise of religion. The Supreme Court stated that burdens on free exercise may be justified only in the name of "a compelling state interest". *Id.* at 403.

No "compelling state interest", requiring the restriction of ESEA benefits as called for by Petitioners, is discoverable. It is not to be found in asserting the Establishment Clause. Nothing is found in the decisions of this Court which suggests that, where there exist competing Free Exercise and Establishment claims, the former are to be suppressed in favor of the latter. The Establishment Clause has never been held to embrace a "preferred freedom" (*cf.*, *Murdock v. Pennsylvania*, 319 U. S. 105, 115 (1942)), nor indeed any freedom whatever. But freedom of religion, as embraced by the Free Exercise Clause, has long been held to be a most precious, exceptionally protectable freedom. *Ibid.* And as this Court has said:

" . . . the Free Exercise Clause . . . recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto. . . ." *School District of Abington Township v. Schempp*, 374 U. S. 203, 222 (1963). (Emphasis supplied.)

It cannot be denied that, if children of low income families, otherwise eligible for services under ESEA, are barred from these on absolutely equal terms with other eligible children, the former (and relatedly their parents) are seriously impeded in enjoyment of "the right to choose their own course" as dictated by religious conscience.

2. **The Exclusion of Children From the Benefits of the Act, Which Results in Loss of Education to Such Children and Loss of Financial Benefits to Parents, Would Deny Both Children and Parents Due Process of Law Contrary to the Provisions of the Fifth Amendment to the Constitution of the United States.**

The opinion of the Court of Appeals amply shows the deprivation of tangible educational benefits to children and related financial loss to parents which would result from a declaration by this Court that, solely because of obeying conscience by the pursuing of a religious education, a child must be rendered ineligible to receive a public welfare benefit for which he would otherwise be eligible.

The deprivation which has been so zealously pursued by the Petitioners on paper-thin pretexts pertaining to statutory interpretation, state law, and administrative efficiency can certainly not be confirmed by this Court on the ground that the Establishment Clause requires it. That would render the Establishment Clause not only as a suppressant of the free exercise of religion but as an engine for denying people benefits to which, as citizens, they have a natural right. The *amici curiae* submit that it would be no answer to assert that the judgment, on Establishment Clause grounds, sought by the Petitioners would, in legal fact, constitute due process. The familiar elements of substantive due process deprivation would be strikingly apparent: (a) an actual deprivation (b) of something of value (c) arbitrarily, or irrationally.

On the question of the arbitrary or irrational character of such a deprivation, perhaps it is sufficient to say that nothing but the despicable in American constitutional history would justify it. It is absurdity itself to imagine that anything whatever, in the will or thinking of the Founding Fathers so much as suggests that children of low-income families in today's society should be legally

yellow-badged out of common educational benefits because of following religious conscience. It defames Madison, Jefferson and the other authors of our Constitution to ascribe to them so thoroughly evil a disposition of mind. Jefferson, one may more sensibly presume, would be horrified at the exclusion, and all of the Founders would decry using the Establishment Clause as a bludgeon for dragging children into a secularist and monolithic public school system.

We have spoken here of "the despicable in American constitutional history", and it is indeed to that tradition that the Petitioners appeal. They would have the Establishment Clause interpreted according to the unhallowed concept of church-state separation which was the core of the Nativist movement,² the rallying cry of the American Protective Association,³ and the objective of like groups which, from 1855 forward (and notably not earlier) rewrote the state constitutions to debar children in religious schools from receiving any public aid.⁴ Its thinking was well expressed to this Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). There the defenders of an Oregon statute which would require all children to attend public schools pleaded:

"Our nation supports the public school for the sole purpose of preservation.

. . .

"Mix those [children] with prejudices in the public school melting pot for a few years while their minds

2. See, G. Myers, *HISTORY OF BIGOTRY IN THE UNITED STATES*, 140-295 (1943).

3. See, D. Kinzer, *THE AMERICAN PROTECTIVE ASSOCIATION*, 95-212 (1964).

4. See, III Debates in the Massachusetts Convention, 614-626 (1853); Bridgman, *THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1917*, iv (1923); J. Pratt, *RELIGION, POLITICS AND DIVERSITY*, 158-203 (1967).

are plastic, and finally bring out the finished produce—a true American.” OREGON SCHOOL CASES COMPLETE RECORD, 732 (1925).

This Court rejected that view, stating:

“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to *standardize* its children by forcing them to accept instruction from public teachers only. *The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*” *Id.* at 534. (Emphasis supplied.)

If the Petitioners now were to succeed in their contention that the Establishment Clause bars ESEA benefits to children in religious schools, they would have gone far in achieving the result which this Court rejected in *Pierce*. Highly vocal proponents of that contention are not lacking on the American scene. Professors Freund and Ulich urge precisely that role for the public school which the defenders of the Oregon statute urged:

“. . . to educate free minds who, on the one hand, appreciate the depth of man’s religious tradition, but to whom, on the other hand, *the old denominational and dualistic conflicts appear secondary*, if not inhibitive to, a unifying world outlook.” P. Freund, and R. Ulich, RELIGION AND THE PUBLIC SCHOOLS, 17 (1965). (Emphasis supplied.)

This view envisions the public school as a *supplanter* of the religious school, the implication being that the public school will supply unifying values which would otherwise be lacking in our society owing to the existence of sects. This assertion goes well beyond mere social unifying and plainly relates to philosophy and religious doctrine. The amici

curiae believe it most relevant to their position in this brief, to express their concern over an establishment of a religion of cultural unity, freely inculcating in children principles of conduct and world outlook while barring the slightest affirmation of the existence of God, the soul, the Commandments, sin, or future reward and punishment. If public education conceives that it is charged with providing a child with a working philosophy of life, if it feels it must address itself to those ultimate questions of the child which were always deemed religious, it then, in fact, teaches and sponsors religion. The task assumed by Freund and Ulich for public education—namely, to raise the mind of the child above the warrings of the demoninations and bring him to a “unifying world outlook”—presupposes a judgment upon the contentions of the “denominations” (which, to these, are contentions for religious *truths*), a judge capable of making the judgment (that is, of arriving at a truth for which he will contend) and then of pronouncing his truth, or a world view, in substitution of older *religious* claims. This in itself is to state a religious claim.

Thus the deprivation which Petitioners here pursue, finding its supposed justification in the Establishment Clause will perforce result in Establishment Clause problems, since it will have the necessary effect of pushing more religious school children into public school, with the great danger that the public school will promote a secularist substitutional religion.

3. The Exclusion Would Constitute an Unreasonable and Arbitrary Discrimination Against Such Children and Parents, in the Exercise of Their Fundamental Liberties, Contrary to the Requirements of the Fifth Amendment to the Constitution of the United States.

This Court in *Bolling v. Sharpe*, 347 U. S. 497 (1954), held that the Fifth Amendment bars racial discrimination

by agencies of the federal government. Certainly, the Establishment Clause must be read in relationship to the limitations of the requirement of equality before the law. As has been seen, this Court has stated that government "cannot *exclude*" individuals, "because of their faith or lack of it" from receiving the benefits of "public welfare legislation". Petitioners here seek to exclude the child Respondents from a general program of public welfare benefits solely "because of their faith" (since only "because of their faith" do they pursue education in state-qualified religious schools).

But as race and alienage may not be employed as standards for discrimination, neither may religion. *Oyler v. Boles*, 368 U. S. 448, 456 (1968). *To hold that an individual must be cut off from welfare benefits aimed at a class to which he plainly belongs, on the ground that these benefits may, to some extent, serve to accommodate his preference for a religious education for his child, is as much an offense to the principles of Equal Protection and of government neutrality towards religion as it is a gross caricature of the principle of Nonestablishment.*

CONCLUSION.

In view of the foregoing, it is submitted that the Court of Appeals was correct in its judgment and that that judgment should be affirmed.

Respectfully submitted,

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